IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-1625

Supreme Court, U. S.
FILED
JUL 10 1978
MICHAEL RODAK, JR., CLERK

IMAGE CARRIER CORPORATION, HOUSE OF LITHOGRAPHY, INC., ASSOCIATED LITHO AND LETTERING SERVICE, INC.,

Petitioners,

v.

EDWARD I. KOCH, MAYOR OF NEW YORK CITY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Questions Presented

1. Does the policy at issue have a rational basis sufficient to meet the Equal Protection standard applicable to local government decisions?

2. Do the petitioners have standing to raise the First Amendment rights of petitioners' employees for the first time upon this appeal?

3. Is the federal Pre-emption Doctrine applicable to the case at bar?

Statement of the Case

On April 12, 1934, the City of New York initiated a policy requiring that all printed forms, except letterheads and envelops, purchased for use by the City of New York bear a union label and that all bidders for contracts to supply such printed matter certify that they operate a union plant and pay prevailing wage rates.*

The purpose of the policy when initially promulgated was, as it is today, to assist members of the printing industry by fostering unionism, and to thereby advance the right of printing employees to bargain collectively for their terms and conditions of employment. Such policy is consistent with federal and state law enacted subsequent to initiation of the New York City policy. National Labor Relations Act, 29 U.S.C. §§151 et seq.; Norris-LaGuardia Act, 29 U.S.C. §§ 101 et seq.; New York Labor Law §§700 et seq.

*The executive order, as originally promulgated, required the label of the Allied Printing Trades Council, but that aspect of the policy was enjoined by the New York Supreme Court in 1937. Amalithone Realty Co., Inc. v. City of New York, 162 Misc. 715, 717 (Sup. Ct., Spec. T., N.Y. Co.), aff'd, 25 AD 450 (1st Dept., 1937).

Printing industry employees have long been recognized by labor authorities as particularly vulnerable to employer pressures against self-organization and collective bargaining. M. Dubofsky, When Workers Organize: New York City In the Progressive Era, p. 6 (1968). This is especially true in New York City where, prior to Mayor LaGuardia's Order, substantial efforts were required on the part of New York City mayors to resolve massive crippling organizational strikes in many industries. M. Dubofsky, supra at pp. 40-42 et seq., 103-104, 108. It is the express obligation of the City of New York to protect the welfare of the employees of a contractor performing work for the City. New York Municipal Home Rule Law §10(10). In light of the

history of the printing industry in New York City, the disputed policy substantially assists in meeting this obligation by helping the worker to protect himself.

The policy requiring independent printing contractors wishing to bid for City work to affix a union label also serves the purpose of bringing order and industrial harmony to at least some shops in a strike-prone industry, thereby ensuring the prompt and timely production of essential government printing.

The policy was challenged pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) by a group of non-union printers (petitioners) who are disqualified, as a result of the policy, from bidding on certain City printing jobs. The substance of the complaint alleged a violation of petitioners' due process

and equal protection rights under the Fourteenth Amendment. The complaint also asserted a violation of the rights guaranteed petitioners' employees under 29 U.S.C. §157, the right to reject labor union representation. No evidence appears in the record to support such assertions and the issue was clearly not considered by the lower courts.

The petitioners and the amici curiae further seek to assert the First Amendment rights of workers for the first time before this Court. There is no evidence in the record regarding the effect this policy has had upon the petitioners' employees and no employee has participated as a litigant in the suit.

Following trial, District Court Judge MacMahon limited his determination to the issue of Fourteenth Amendment equal protection

violations (20a-22a).* Rejecting, on the evidence, respondents' contentions that the policy ensures higher quality work, facilitates the policing of compliance with prevailing wage rates and payment of overtime rates, makes available more advanced technology and obviates the need for shop inspections, Judge MacMahon found no rational basis for the City's policy and concluded that it violates the equal protection clause of the United States Constitution (25a).

On appeal, the Second Circuit Court of Appeals reversed the District Court decision as to equal protection and found no violation of petitioners' due process rights (4a). The Court of Appeals did not

*Numbers in parentheses refer to pages of the Petition for Writ of Certiorari unless otherwise noted.

disturb any of the factual findings relied upon by the District Court, but found that the City's rationale for promulgating the subject policy, i.e., to equalize bargaining power by fostering unionism, was consistent with declared federal and state policy and met the rational basis test for equal protection.* The Court of Appeals concluded: "And in economic matters, whether under the guise of substantive due process,... or of equal protection, ... the courts have not, since the days of the Depression, interfered with legislative judgments rationally related to a legitimate governmental objective" (citations omitted) (13a).

*Contrary to petitioners' assertion that this rationale was first offered "during oral argument" (8), respondents thoroughly briefed such argument in their written submission to the Court of Appeals filed three months prior to oral argument.

POINT I

THE COURT OF APPEALS CORRECTLY FOUND THAT THE POLICY AT ISSUE HAS A RATIONAL BASIS AND DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION. THERE IS NO CONFLICT WITH APPLICABLE PRECEDENT.

The Executive Order of 1934 states that the reason the union label requirement was established was to aid and assist printing employees. District Court Judge MacMahon recognized this as the primary purpose of the challenged policy, but failed to consider it as supplying the rational basis necessary to meet equal protection standards (23a). This oversight on the part of the District Court did not preclude the Court of Appeals from finding such purpose sufficient as a matter of law in light of established federal and state policy to foster

collective bargaining so that the bargaining power of the worker may be more equitably balanced against that of his employer.*

In New Orleans v. Dukes, 427 U.S. 297, 303-304 (1976), this Court reiterated the rules applicable to the case at bar:

> "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations.... Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step, ... in such economic areas, adopting regulations that only partially ameliorate a preceived evil and deferring complete elimination of the evil to future regulations. . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, ...; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot

*Even without the rational basis supplied by this judicially approved legislative policy favoring unionization and collective bargaining (see National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)), there is adequate evidence in the record to substantiate respondents' contention that union membership, which is clearly promoted by the City policy at issue, does, in fact, improve the lot of the printing employee. For example, wages paid to union employees across the board are nearly twice those generally paid in non-union shops for comparable services. In addition, union workers receive substantial fringe benefits not available in the non-union shops operated by petitioners.

> stand consistently with the Fourteenth Amendment...." (citations omitted).

In the New Orleans case, this Court found the challenged "grandfather provision" in a local ordinance rationally related to the intent expressed in the legislation to preserve the character of the Vieux Carre, an objective this Court found to be obviously legitimate. Respondents submit that the decision of the Second Circuit Court of Appeals in the instant case is completely consistent with the principles recently set forth in New Orleans v. Dukes, Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 489-493 (1977) and Dandridge v. Williams, 397 U.S. 471 (1970). See also, Hughes v. Alexandria Scrap Corporation, 426 U.S. 794, 812 (1976), in which this Court expressly found to be unnecessary statistical

verification of a logical assumption that a particular policy will achieve a desired result.

It is uncontested that petitioners do not possess a fundamental right to obtain government contracts. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312-314 (1976); Atkin v. Kansas, 191 U.S. 207, 222 (1903). "When the state exercises its proprietary or business power, ... it is subject to no more limitation than a private individual or corporation would be in transacting the same business.... [T]he letting of public contracts, particularly those providing for internal needs of government, is a proprietary function." American Yearbook Co., Inc. v. Askew, 339 F. Supp. 719, 721 (M.D. Fla., 1972, three judge court), aff'd w/o opin., 409 U.S. 904

(1972). See also, Perkins v. Lukens Steel Co., 310 U.S. 113, 127-128 (1940).

The decision of the Second Circuit Court of Appeals is correct and consistent in every respect with the rulings of this Court.

POINT II

THE FIRST AMENDMENT RIGHTS OF PETITIONERS' EMPLOYEES ARE NOT AT ISSUE IN THIS CASE.

Petitioners and their amicus curiae supporters urge this Court to grant certiorari to consider the right of petitioners' employees to refrain from collective bargaining activities and union membership pursuant to the National Labor Relations Act ("NLRA"), 29 U.S.C. §157 and the First Amendment to the United States Constitution. The statutory rights of workers under Section 7 of the NLRA are related to petitioners' pre-emption argument

and will be more fully considered at Point III.

The First Amendment rights of petitioners' employees were not raised in the complaint, nor were they litigated in the lower courts. There is no evidence in the record which supports the speculations of petitioners and the amici that the policy of requiring certain printing contracts to be awarded to union shops chills the exercise of First Amendment rights or frustrates the rights of workers to decertify a labor organization or even forces employees to initiate union representation. Indeed, the fact that the trend in the printing industry in New York City is away from union membership does, as Judge Oakes noted in his opinion for the Court of Appeals (10a), mitigate against such conclusion.

The policy at issue does not require workers to join a union, nor does it regulate the printing industry at large. The policy is limited in its application to those private contractors who wish to bid for government contracts. It is intended to provide an incentive to the employer to co-operate in workers' attempts to organize for the purpose of collective bargaining. In this respect, the policy is intended to assist the worker in securing those rights which petitioners claim have been violated. Petitioners' argument appears to fly in the face of accepted government policy, both state and federal, to promote collective bargaining in the interest of industrial peace. In Abood v. Detroit Board of Education, 431 U.S. 209, 222 (1976),*

*Abood is distinguished from the case herein by the fact that the Michigan statute authorized an agency shop arrangement requiring local government employees to pay union dues. The government policy at bar in no way restricts the associational rights of workers, public or private.

this Court noted, citing Railway Employees' Department v. Hanson, 351 U.S. 225 (1956), and Machinists v. Street, 367 U.S. 740 (1961), that union membership invariably interferes with the member's associational rights in many respects, but noted that "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress."

This Court has declined to consider arguments, such as that raised herein, which have not been pleaded or litigated below but are first raised upon appeal to this

tribunal.* Miree v. DeKalb County, 433 U.S. 25, 33-34 (1977); Tennessee v. Dunlap, 426 U.S. 312, 316 ftnt. 3 (1976). Moreover, the petitioners clearly do not have standing to litigate speculative violations of the First Amendment rights of their employees who are not parties to this suit. Warth v. Seldin, 422 U.S. 490 (1975).

* The effect of New York General Municipal Law §103 providing for the award of contracts to the lowest responsible bidder has also been first raised upon this application by amicus National Right to Work Legal Defense Foundation (Amicus Brief at p. 5). Such argument should not be considered at this time since it has not heretofore been advanced by the petitioners to support their alleged right to bid and requires the interpretation of state law. Similarly, the suggestion by amicus curiae petitioner National Association of Manufacturers that anti-trust laws may be violated by the policy at issue should also be disregarded as such alleged violations were never the subject of this suit. Both City of Lafayette v. Louisiana Power & Light Co., 46 U.S.L.W. 4265 (March 29, 1978) and Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616 (1975), concerned violations of federal anti-trust laws and are not supportive of the instant petition.

POINT III

THE MUNICIPAL POLICY RESTRICTING BIDDING ON CERTAIN PRINTING CONTRACTS TO UNION SHOPS IS NOT PRE-EMPTED BY FEDERAL LAW.

In Abood v. Detroit Board of Education, supra, 431 U.S. 209, 223, this Court stated unequivocally: "The National Labor Relations Act leaves regulation of the labor relations of state and local governments to the States." Presumably, if the federal scheme of labor-management regulation permits a state government to contract an agency shop agreement for its own employees, a policy such as that at issue, which merely sets a condition upon private bidders for public contracts and does not directly affect their employees at all, cannot be subject to federal pre-emption under 29 U.S.C. §157.

Moreover, it is submitted that federal law is intended to regulate actual labor-management and union-member disputes between employees and their employers and unions. The NLRA was not intended to regulate any and all aspects of local policy which may have some relationship to organized labor and collective bargaining, particularly when that policy does not involve inter-state commerce. It is "conduct" or "activities" in the nature of unfair labor practices that are the subject of federal pre-emption, not local government policies intended to further both local and federal purposes. Cf., Amalgamated Association of Street, Electrical Railway & Motor Coach Employees of America v. Lockridge, 403 U.S. 274 (1971) (particularly dissenting opinion of White, J. at 317-318); San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

The Court of Appeals here found that, in the absence of any indication that the practice at issue in any way alters the collective bargaining relationship within nonunion shops, "there is no need to determine whether Congress intended that federal labor law preempt those local practices which do alter collective bargaining relationships" (10a). The Court correctly held that the policy at issue does not require any employee to join a union and is not, therefore, pre-empted by Section 7 of the NLRA.

CONCLUSION

The petition for a writ of certiorari should be denied.

July 12, 1978

Respectfully submitted,

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